

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

MICHAEL JOSEPH SIMS,	)	4:07CV3088
	)	
Petitioner,	)	
	)	
v.	)	<b>MEMORANDUM</b>
	)	<b>AND ORDER</b>
ROBERT HOUSTON, Director,	)	
	)	
Respondent.	)	

This matter is before the court on Petitioner Michael Sims’ (“Sims”) Motion for Certificate of Appealability (filing no. [61](#)) and Motion for Leave to Appeal in Forma Pauperis (“IFP”) (filing no. [62](#)).

On May 19, 2009, Sims filed a Motion for Relief from Judgement (“Rule 60(b) Motion”) challenging the court’s progression of his Petition for Writ of Habeas Corpus. (Filing No. [57](#).) The court denied Sims’ Rule 60(b) Motion (filing no. [59](#)) and Sims timely filed a Notice of Appeal (filing no. [60](#)). Sims also filed the motions at issue in this Memorandum and Order (i.e., filing nos. [61](#) and [62](#)).

***I. Motion for Leave to Appeal in Forma Pauperis***

Sims is a prisoner who was previously granted leave to proceed IFP. (Filing No. [46](#).) [Federal Rule of Appellate Procedure 24\(a\)\(3\)](#) states:

(a) Leave to Proceed in Forma Pauperis ....

(3) Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court – before or after the notice of appeal is filed–

certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding[.]

*Id.* The court finds that, because Sims was previously given leave to proceed IFP, he may now “proceed on appeal in forma pauperis without further authorization” in accordance with [Federal Rule of Appellate Procedure 24](#).

## *II. Motion for Certificate of Appealability*

Before Sims may appeal the denial of his Rule 60(b) Motion, a “Certificate of Appealability” must issue.<sup>1</sup> Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the right to appeal such a denial is governed by [28 U.S.C. § 2253\(c\)](#), which states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ....

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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<sup>1</sup>The United States Court of Appeals for the Eighth Circuit has recognized that the certificate requirement applies to an appeal from the denial of a Rule 60(b) motion seeking to reopen a habeas case. See [United States v. Lambros](#), 404 F.3d 1034, 1036 (8th Cir. 2005); see also [United States v. Vargas](#), 393 F.3d 172, 174 (D.C. Cir. 2004) (holding that a certificate is required to appeal the denial of a Rule 60(b) motion when the motion challenges the denial of a habeas application and stating that eight circuit courts (including the Eighth Circuit) are in accord on this issue).

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

A certificate of appealability may issue only if Sims has made a substantial showing of the denial of a constitutional right. See [28 U.S.C. § 2253\(c\)\(2\)](#). A “substantial showing” requires a showing that the issues are debatable among reasonable jurists, the court could resolve the issues differently, or the issues deserve further proceedings. [Garrett v. United States, 211 F.3d 1075, 1077 \(8th Cir. 2000\)](#).

The court has carefully reviewed the record in this matter and finds that Petitioner has failed to make a substantial showing of the denial of a constitutional right. For the reasons stated in its August 6, 2009, Memorandum and Order (filing no. [59](#)), which denied Petitioner’s Rule 60(b) Motion, the court declines to issue a Certificate of Appealability.

IT IS THEREFORE ORDERED that:

1. Petitioner’s Motion for Leave to Proceed in Forma Pauperis (filing no. [62](#)) is granted.
2. Petitioner’s Motion for Certificate of Appealability (filing no. [61](#)) is denied without prejudice to reassertion before the Eighth Circuit.
3. The Clerk of the court shall provide the Court of Appeals a copy of this Memorandum and Order.

November 10, 2009.

BY THE COURT:

*Richard G. Kopf*

United States District Judge

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